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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 619

ARTHUR L. HARRIS, SR., ARTHUR L. HARRIS, JR., ERNEST E. LEA and CHARLES W. MARSHALL,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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ARTHUR L. HARRIS, SR., ARTHUR L. HARRIS, JR., ERNEST F. LEA and CHARLES W. MARSHALL,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Arthur L. Harris, Sr., Arthur L. Harris, Jr., Ernest F. Lea and Charles W. Marshall, respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in order to review its judgment affirming judgments of the United States District Court for the Southern District of California adjudging petitioners guilty of violation of 18 U. S. C. 1341 and 371 and sentencing petitioners Harris to $10,000.00 fine and three years imprisonment and petitioners Lea and Marshall to 18 months imprisonment.

Opinions Below.

The trial court delivered no written opinion upon the rendering of judgment [C. T. 281, 284, 287, 290].[1]

The opinion of the court below [C. T. 319] and its opinion on denial of rehearing [C. T. 328] are not yet reported. They are appended hereto as Appendices "A" and "B" respectively.

The judgment of the court below [C. T. 326] is appended hereto as Appendix "C".

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed and the time of its entry is June 24, 1958 [C. T. 326].

2. The date of order denying rehearing is November 6, 1958 [C. T. 327]: Justice Douglas granted an extension of time to file petition for writ of certiorari to and including January 5, 1959 (Order dated November 21, 1958).

3. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 U. S. C. 1254(1), 18 U. S. C. 3772 and Rule 22(2) of this Court.

Execution of the judgment has been stayed pending filing of this petition and its disposition by this Court.

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[1]The Clerk's Transcript will be referred to as [C. T.] and the Reporter's Transcript as [R. T.]. During the trial, the District Court rendered a written opinion re View of Premises [C. T. 161]. That opinion is reported in 141 Fed. Supp. 418. It is not appended hereto as an appendix for the reason that it is not involved in the questions presented by this petition and would therefore unnecessarily add to the length hereof.

Questions Presented for Review.

1. Is the right of the defense to see a statement used by a witness to refresh his recollection confined to where the witness uses the statement in court, or does the defense also have that right where, as here, the witness so uses the statement just prior to testifying and while waiting in the witness room to testify? Was *Goldman v. United States*, 316 U. S. 129 relating to the production of statements used by a witness out of court to refresh his memory overruled by *Jencks v. United States*, 353 U. S. 657?

2. Where, in a case tried before this court's decision in *Jencks v. United States*, 353 U. S. 657, but in clear violation of the rule in that case, the trial court denied the defense the right to see statements made by the witnesses, signed by the witnesses, in the possession of Government counsel and pertaining to the events and activities as to which the witnesses testified and where neither the trial court, the defense nor the court below have been permitted to see the statements, may the Court of Appeals refuse to reverse on the ground that there was no "prejudice" and there was "harmless error"?[2] Where the *Jencks* rule is violated, must a defendant show prejudice in order to be entitled to a reversal? May a clear violation of the *Jencks* rule be harmless error? If the answer to either or both those last two questions

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[2]Petitioners set these phrases in quotation marks because they do not recognize that the "no prejudice"—"harmless error" doctrine is applicable to a case wherein the defense is denied the right to evidence to which it is clearly entitled under *Jencks*. This is so because prejudice is inherent in the denial to the defense of the evidence and the only person who can make the determination as to the use to which to put the evidence is the attorney for the defense. This is the central point of Point III of this petition and is the thrust of *Rosenberg v. United States*, No. 451, this Court, this Term, as to which certiorari has been granted.

is "yes", were not defendants prejudiced here and denied a fair trial and was not the error harmful rather than harmless?

Constitutional Provision and Statutes Involved.

The statutes of which petitioners were found guilty are 18 U. S. C. 1341 (62 Stat. 763, amended 63 Stat. 94) and 18 U. S. C. 371 (62 Stat. 701). The texts are set out hereinafter as Appendix "D".

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

Statement of the Case.

Basis for Federal Jurisdiction in the Court of First Instance.

The trial court had jurisdiction under 18 U. S. C. 3231.

Facts.

Though this is a case involving charges of mail fraud [18 U. S. C. 1341; C. T. 2-62] and conspiracy to commit same [18 U. S. C. 371; C. T. 62-70] in transactions concerning real estate, it is not a case where the subdivider did not subdivide in accordance with applicable law, nor where purchasers did not receive good title, nor where money paid for lots was misappropriated, nor where purchasers were prevented from seeing what they purchased.

It is a case where the charges concern representations by salesmen, as to what was in the surrounding area, the facilities available for the lots and what the prospects for the future were. It was a closely contested case. It can be truly said that had this Mojave Desert area bloomed

as so many others have, there would have been no complaints and no prosecution. The lack of economic success brought on the reverse.[3]

The major portion of the Government's case consisted of the testimony of the buyers of the lots, described by the court below as "the investor witnesses" [C. T. 329; Appx. B, 11]. In its case in chief, the Government called 44 witnesses in all, of which 29 were investor witnesses. Of the 5049 pages of the Reporter's Transcript consumed in presenting the Government's case [R. T. 176-5255], 2768 pages were used for the testimony of these witnesses.

After about one-half of the Government's investor witnesses had testified, it developed on cross-examination of one of them [R. T. 4300] that the Government, in the course of its investigation, had sent a questionnaire to her which, upon completion, she returned [R. T. 4460]. Additionally, while waiting in the conference room to be called as a witness, she had used that very statement to refresh her recollection in connection with the precise testimony she gave in court [R. T. 4459].

Defense counsel's request that he be allowed to see the questionnaire and the answers was denied [R. T. 4462].

Although neither defense counsel, nor the court,[4] saw the statement signed by this witness and used by her just prior to testifying, her recollection, a blank copy of the questionnaire and the letter accompanying it from the United States Attorney's office was allowed to be

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[3]Thus, the investor witness, Bajarano, testified [R. T. 4954] "I tell I want the money because, the Government investigator—... the Government investigated the business; so that didn't look so good to me . . ."

[4]Nor the court below.

introduced in evidence [R. T. 4945]. This disclosed that the statement concerned the very events and activities, indeed the very questions, about which the investor witnesses were testifying on the stand [Ex. ZZ 115].* Just by way of example, and not unduly to lengthen this petition, nor to suggest that the questions selected are any more crucial than others, we set out in parallel columns but two questions asked Mrs. Craggs on direct examination and the very same questions asked of her on the quesitonnaire:

Direct Examination	*Questionnaire* [Ex. ZZ 115]
R. T. 4164: "Just what did Mr. Hamilton say with respect to electricity?"	R. T. 4948: "What representations were made to you, and by whom, with respect to the availability of the following utilities on your lot?" "Electricity:"
R. T. 4169: "Now, what, if anything, was said about a building program in Rocket Town?"	R. T. 4950: "What was said with respect to stores, shops, theatres and churches being built in Rocket Town?"

Although rebuffed in the attempt to see the statement made by the witness Mrs. Craggs, defense counsel, after having established on cross-examination that the witnesses Bouwkamp had also received, filled out and signed the same questionnaire concerning the subject matter of their testimony [R. T. 4698, 4699], again requested to see it [R. T. 4699]. The court once more ruled the defense was not entitled thereto [R. T. 4700-4701].

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*The covering letter and the questionnaire are set out hereinafter as Appendix "E."

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

I.

The Decision of the Court Below Is in Conflict With Decisions of Other Courts of Appeal on the Same Matter.

The decision below conflicts with *Bergman vs United States*, 253 F. 2d 933 (C. A. 6, 1958) and with *United States v. Killian*, 246 F. 2d 77 (C. A. 7, 1957), in neither of which did the Government seek certiorari.[6]

In the instant case, the court below upheld [C. T. 324; Appx. A, 8], the trial court's ruling sustaining the prosecution's objection to the production of the statements on the ground that they were work papers of the United States Attorney not subject to production. The court attempted to distinguish the *Jencks* case, *inter alia*, on the ground that the defense did not request the questionnaires of all the witnesses but only of two. It held there was no "prejudice".[7]

In the *Killian* case, the defense requested the production of the statement of only one witness, not all three. The Court of Appeals in its main decision held (246 F. 2d at 82):

> "As to Fensholt's reports, a large discretion must be allowed the trial judge with respect to the production of documents and in the absence of abuse, the exercise of that discretion will not be upset. . . . The area of discretion is especially broad where (as here) the documents sought are 'part of the Government's files.' . . . ."

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[6]Both of these cases were called to the Court's attention below on the petition for rehearing (pp. 6 and 12).

[7]The court also held there was no error, but we will take this matter up below under Point III.

But on rehearing after this Court's decision in *Jencks*, the court reversed and remanded for new trial.

In the *Bergman* case, the court said (253 F. 2d at 935):

> ". . . The failure of the district court to make Chitwood's prior statement available to the defense requires that the judgments be set aside. We reach the conclusion with reluctance in view of the likelihood that the failure to make Chitwood's statement available actually worked *no prejudice* to the defendants, and in view of the generally conscientious and fair conduct of the long and complicated trial by the district judge." (Italics added.)

And on rehearing (253 F. 2d at 936):

> "Upon consideration of the petition for rehearing, we are of the opinion that it is not proper for this court to determine whether the appellants were *prejudiced* by failure to make available the prior statement of a witness, any more than it would be proper for the trial court to determine whether a prior statement of a witness should be turned over to defense counsel on the basis of whether the statement is inconsistent with the witness's testimony in open court." (Italics added.)

Both the *Bergman* and *Killian* decisions recognized the *Jencks* rule to be that it is not proper for the appellate court, in order to avoid reversal, to indulge in the hypothetical exercise as to whether prejudice has been suffered in keeping from the defense evidence which might be useful to it. The instant case is precisely to the contrary.[8]

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[8]The instant case is also in conflict with *Bergman* on another point: that the statements were made not contemporaneous with the events being testified to. In *Bergman*, as here, the former statements were not made contemporaneously with the occurrences

Under this Court's Rule 19(1)(b) (1st phrase) this is a proper occasion for the granting of certiorari to resolve the conflict.

II.

The Court Below Has Decided an Important Question of Federal Law, Namely, Whether the Production of Documents Containing Prior Statements Made by the Witness and Used by Him to Refresh His Recollection, Is Confined to Where the Witness Resorts to the Document in Open Court. This Question Should Be Settled by This Court in the Light of the Uncertainty Cast Upon Goldman v. United States, 316 U. S. 129 by This Court's Decision in the Jencks Case.

It will be recalled that on cross-examination the witness Craggs testified that while she was waiting in the conference room to be called as a witness, she went over the former statements made by her in the questionnaire to refresh her recollection as to the matters about which she was testifying in court [R. T. 4459]. To defense counsel's request that he was entitled to see the statement, Government counsel objected [R. T. 4461] and was sustained [R. T. 4462]. The colloquy was as follows [R. T. 4461-4462]:

"Mr. Neukom: We object to that, your Honor. Those are in the nature of our work papers, and,

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In this connection attention is invited to the Government's position in *Indiviglio v. United States*, 357 U. S. 574, to be discussed below, wherein it said (the argument on this point incorporated [p. 11] the Government's argument in the Brief in Opposition (p. 13) in *Giordenello v. United States*, 357 U. S. 480):

"We think that the Jencks' rationale would require production of Adams' statement, although that statement was not contemporaneous with the events to which his testimony related."

furthermore, the witness has not utilized them while she has been up on the stand.

". . .

"Mr. Neukom: The witness has testified, as it has been very apparent here, from her own recollection. The fact she may have written us a letter or used a questionnaire heretofore is not grounds to ransack through our files or our working papers.

"Mr. Houck: The court please, all I want is this one questionnaire and answers, which the witness testified she read over up in the conference room before testifying and for the purpose of refreshing her recollection, to make her testimony more definite.

"Mr. Neukom: It has not been apparent here, your Honor, that this witness has not testified from her actual recollection. She—

". . .

"The Court: Denied. I think I should do what other courts have done in like situations."

It is apparent that both the United States Attorney and the trial court were articulating the rationale of the *Goldman* case and the practice that case seems to sanction.

In its decision in *Jencks*, this Court said (353 U. S. at 668):

"This Court held in Goldman v. United States, 316 US 129, 132, . . . that the trial judge had discretion to deny inspection when the witness '. . . does not use his notes or memoranda [relating to his testimony] in court . . .' *We now hold* that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matasow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., touch-

ing the events and activities as to which they testified at the trial. . . ." (Italics added.)

In Shepard's Citations, this Court's ruling in the *Goldman* case on the question of the right to the production of documents only when the documents are used to refresh recollection in open court, is listed as "q".[2]

In his dissenting opinion in the *Jencks* case, Mr. Justice Clark said (353 U. S. at 680):

". . . It seems to me that proper judicial administration would require that the Court expressly overrule Goldman v. United States, 316 US 129, 132, (1942), which is *contra* to the rule announced to day. But that is not done. That case is left on the books to haunt lawyers and trial courts in their search for the proper rule. . . ." (Italics in original.)

In *Indiviglio v. United States*, 249 F. 2d 549, 555 (C. A. 5, 1957), the Court of Appeals relied, *inter alia*, on the *Goldman* case in support of its ruling. This Court reversed on the basis of *Jencks* (357 U. S. 574).

Under these circumstances, this is a proper case under this Court's Rule 19(1)(b) (third phrase) to grant certiorari and to, indeed, overrule, and lay to rest the ghost of, the *Goldman* case.

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[2] Shepard's United States Citations, October, 1958, page 226. In its explanation of the abbreviations, page 8 of the October, 1958 citator, Shepard's explains that "q" means: "(Questioned) Soundness of decision or reasoning in cited case questioned."

III.

The Decision of the Court Below Is in Conflict With Applicable Decisions of This Court.

The decision below is in conflict with this Court's decision in *Jencks v. United States*, 353 U. S. 657; *Scales v. United States*, 355 U. S. 1; *Lightfoot v. United States*, 355 U. S. 2; and *Indiviglio v. United States*, 357 U. S. 574.

In its main opinion, the court below sought to distinguish the instant case from *Jencks* on the following grounds [C. T. 324; Appx. A, 7]:[10]

1. that the statements were signed many years after the happening of the occurrences in question;[11]

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[10]The candor of the United States Attorney in presenting this matter to the court below is to be commended. In his reply to petitioners' argument on the *Jencks* point, in arguing for a factual distinction between this case and *Jencks*, he said (p. 2 of Appellee's Reply to Supplement to Appellants' Opening Brief):

> ". . . It may be that there is a distinction without a difference. . . ."

The entire paragraph to which we call attention reads as follows (pp. 1 and 2):

> "Our reasoning and logic would be severely strained if we were to urge that there is not some similarity between the error noted in the Jencks Opinion and the questionnaires involved here. Indeed it is but fair to say that in this and the *Jencks* case there was involved statements of witnesses who had testified. It is our hope to illustrate that there is a distinction between the factual situation of the *Jencks* case and the instant case. It may be that there is a distinction without a difference, however, we feel it proper to endeavor to call attention to the differences existing between this and the *Jencks* case."

[11]This is not precisely accurate. It is apparent that the questionnaires were sent out in early February, 1954 [R. T. 4945]. As to the witness Craggs, the occurrences about which she testified took place, at the earliest, in October, 1953 [R. T. 4158]. It is true that three witnesses (Crummer [R. T. 3012], Kendall [R. T. 3005] and Martindale [R. T. 5124]) testified to occurrences in

2. that they were sent out by the Government as a part of the investigation and prosecution of the present case;[12]

3. that the defense did not ask for all the questionnaires;[13]

4. that the issue was not raised before trial;[14]

5. that it was not developed further during the trial.[15]

On the basis of these "distinctions," the court below held [C. T. 324; Appx. A, p. 8] "there was no prejudice or error."

On rehearing, after petitioners had pointed out that the *Jencks* rule was not predicated on *when* the witness had signed the statement but on the fact that if the Government offered witnesses and it developed that they had previously made statements "touching the events and activities as to which they testified at the trial" (353 U. S. at 668), denial of access to those statements called for reversal,[16]

1949, but a large number (*e.g.* Hansen [R. T. 767], Cockerell [R. T. 1033], Collins [R. T. 1155], Dutton [R. T. 1535, 1536], Stowell [R. T. 2415-16], Schlepp [R. T. 4733], Perry [R. T. 4977]) testified to occurrences in 1953. Others were in between, the witness Bouwkamp testifying as to occurrences in 1952 [R. T. 4631].

[12]We fail to see any distinction between the instant case and *Jencks* on this point.

[13]It would seem that having been denied twice, defense counsel ought not to be required to risk contempt (*Cf. Sacher v. United States*, 343 U. S. 1) in order to protect the record. This same matter is discussed in the Petition for Writ of Certiorari in the *Rubin* case, No. 437, this Court, this term, page 10, certiorari granted (27 L. W. 3176).

[14]This, of course, is not within the purview of *Jencks* altogether. *Cf. DeCasaus v. United States*, 250 F. 2d 150, 154 (C. A. 9, 1957), cert. den. 356 U. S. 949.

[15]*Cf.* fn. 13, *supra*.

[16]Considerable legal writing, case analyses and analysis of 18 U. S. C. 3500(e)(1), to show even under that post-Jencks statute, the late signing of a written statement could not prevent the defense's right to the statement, were called to the court's attention.

the court, in effect, withdrew from its position that there had been no error.[17] Instead it shifted to the theory of no "prejudice" [C. T. 329; Appx. B, 11].[18] It seems clear, however, that the *Jencks* rule, which holds that the defense is entitled to see the statements so that *it* may "determine what use to make of them," (353 U. S. at

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[17]Thus it said [C. T. 329; Appx. B]: "If the trial court had ruled in the face of Jencks, a different situation might be presented." and "It is probable, if the trial court were faced with the same question now, production would be required even if the rule of Jencks did not so require."

[18]"If we were to go to the full extent of the position of defendants and hold the ruling was plain error, still a reversal would not be justified in our opinion. If all the investor witnesses had been excluded, there was overwhelming evidence not only to justify conviction, but almost to compel a finding of guilt." We do not believe the court below intended so sweeping a generalization. The indictment charged mail fraud and the use of the mails to investors [C. T. 18, 19, 20, etc.]. If there were no investors to testify the mails had been used, the Government, perforce, would have no case at all. Moreover, there could have been no proof of reliance by the investor witnesses, a factor upon which the Government so heavily depended in its argument below (App. Reply Br. p. 98). Furthermore, it is manifest that the Government did not share the court below's view as to the lack of importance of the investors' testimony. In its brief below it told the court that (p. 116): 'The Government . . . was *required* to put on the various investor witnesses . . ." (italics added) and it devoted no less than 67 pages of an Appendix to summarizing the testimony of the investor witnesses. It urged (p. 116 of App. Br.) "that the pattern testified to by most of the investor witnesses of the *representations made to them* were strikingly similar" and that (p. 119) "the *jury may conclude* from the entire picture that the Harris did authorize and ratify many of the *representations* that the *investors testified were made to them* by various salesmen." (Italics added.) It is also to be noted that in its main opinion, inconsistently with its statement on rehearing, the court below relied on the testimony of the lot purchasers. *E.g.* [at C. T. 320; Appx. A, 2, 3]:

> ". . . The lot purchasers in great number testified in minute detail in support of all the counts which were submitted to the jury. . . ."
>
> ". . . While the testimony of the lot purchasers as to representations made to them by various salesmen not indicted were not conclusive, this evidence could be considered by the jury. . . ."

669) because "justice requires no less" (*ibid.*) since without inspection "the accused is helpless to know or discover conflict" (353 U. S. at 668)[19] is not predicated on a showing of prejudice.

So to confine the *Jencks* rule is to destroy it. This Court predicated the rule on a concept of due process.[20] Senator Hennings predicates the rule on the 6th Amendment right to confrontation (44 A. B. A. J. I. 213, 214).[21] Regardless of its root, the lack of prejudice concept to justify keeping relevant evidence from an accused has no place in our judicial scheme.

This is not to suggest that petitioners acquiesce in the suggestion that there was no prejudice. We think it manifest from an examination of the statement [R. T. 4943-4951; Appx. E] that had the answers to the questions therein been contrary to or cast in a different perspective from, the testimony of the witnesses in court, an entirely different light would have been thrown on the case. Where a case is permitted to go the jury on both a right and a wrong theory, there is no way of knowing on which basis the jury decided and this Court will reverse. (*Yates v. United States*, 354 U. S. 298, 312; *Stromberg v. California*, 283 U. S. 359, 367; *Williams v. North Carolina*, 317 U. S. 287, 291; *Cramer v. United States*, 325 U. S. 1, 36, note 45). So here. Without the

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[19]Quoting in footnote 12 from Chief Justice Marshall in *United States v. Burr* (C. C. Va.), Cas. No. 14694, p. 187.

[20]"Justice requires no less." (353 U. S. at 669.)

[21]See also Chief Judge Learned Hand in *United States v. Coplon*, 185 F. 2d 629, 638 (C. A. 2, 1950), cert. den. 342 U. S. 920:

> ". . . (W)e cannot dispense with constitutional privileges (the right to see evidence which the trial court had examined *in camera* and ruled that the evidence did not lead to any evidence adduced at trial) because in a specific instance they may not in fact serve to protect any valid interest of their possessor."

defense being even able to present the evidence, how can the appellate court know what the jury would have done had the evidence been submitted to the jury. The prejudice in denying the defense access to the evidence is inherent.[22]

Moreover, the court below, without knowing what the statements contained, but nevertheless holding that conviction was justified, has usurped the function of the jury. And it has acted, we respectfully suggest, in a vacuum. The very attempt by the Court below to step into the shoes of the jury demonstrates its error in so doing.[23]

This Court's reversals in *Scales* (355 U. S. 1) and *Lightfoot* (355 U. S. 2), also demonstrate the conflict between those decisions and the instant case. Perhaps even more so does the reversal in *Indiviglio v. United States*, 357 U. S. 574.

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[22]The actuality of prejudice in this case is emphasized by the fact that prior to testifying, investor witnesses were all together in a conference room discussing the case. While there it came up that [R. T. 1248] "if this came out all right (if the defendants were convicted [R. T. 1249]) we maybe could get our money back." The prejudice in denying the defense the opportunity to compare the statements made by these witnesses in the privacy of their homes before they were all together and discussing their community of interest in the successful outcome of the prosecution, is manifest.

[23]*Cf. Bollenbach v. United States*, 326 U. S. 607, 614, 615:

". . . In view of the Goverment's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.

". . . In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

In the case last mentioned, the primary basis for this Court's reversal was the *Jencks* case. An examination of the Government's Memorandum on petition for writ of certiorari is revealing. In reply on the issue of the trial court's failure to turn over to the defense a statement of a government witness, the Solicitor General referred (p. 11) to his discussion in his Memorandum in *Giordenello v. United States*, No. 515 Misc., Oct. Term, 1957.[24]

In discussing the reasoning of the Court of Appeals in *Indiviglio* that there was a distinction between that case and *Jencks* because the statements in the former were not contemporaneously made, a part of the rationale of the court below in the instant case [C. T. 324; Appx. A, 7] the Government said (p. 13):

> "We think that the Jencks rationale would require production of Adams' statement, although that statement was not contemporaneous with the events to which his testimony related."

However, the Government sought to uphold the Court of Appeals' judgment on its theory of "harmless error." Thus, the Solicitor General said (pp. 13-14):

> ". . . On this aspect of the case, we are also of the view that the error may properly be characterized as *harmless* and that failure to produce the statement is not grounds for reversal . . .
>
> ". . . Under these circumstances, the 'harmless error' doctrine is properly applicable to non-production of the statement here. Cf. *Sheba Bracelets v. United States*, 248 F. 134, 144-146 (C. A. 2), certiorari denied, December 9, 1957 (No. 556, Oct. Term, 1957); *Simms v. United States*, 248 F. 2d 626, 629-630 (C. A. D. C.), where courts of appeal held

[24]This Court's decision on the merits in that case is reported at 357 U. S. 480.

non-production, although production was required by *Jencks*, to be *harmless error*. See also *United States v. Socony Vacuum Oil Company*, 310 U. S. 150, 235." (Italics, other than case names, added.)

In the face of this argument by the Solicitor General, the fact that this Court reversed *Indiviglio* on the basis of the *Jencks* case takes on added significance and again shows the departures from *Jencks* which the court below here took.

The rationale, even the language, of the Court of Appeals in *Indiviglio* (249 Fed. 549) and in the instant case are remarkably similar. Parallel columns will demonstrate:

The Instant Case	*Indiviglio*
C. T. 328, Appx. B, 10: ". . . But the Court should not frustrate justice to satisfy a formalistic pattern . . .	249 F. 2d at 565: ". . . The error they (appellants) complain of is one relating to procedure alone. Appellants arguing under the facts of this case for reversal, are more 'concerned with the mere etiquette of trials and with the formalities and minutiae of procedure' than with the substantial merits . . ."
"It is not believed that Jencks requires conformity to a ritualistic taboo . . .	
C. T. 329; Appx. B, 11: "If we were to go to the full extent of the position of defendants and hold the ruling was plain error, still a reversal would not be justified in our opinion. If all the investor witnesses had been excluded, there	249 F. 2d at 564: ". . . (T)he guilt of these appellants was abundantly established without any reliance upon Adams' testimony." 249 F. 2d at 565: ". . . The fair inference from this record is that the

was overwhelming evidence not only to justify conviction, but almost to compel a finding of guilt."	Government has at great expense turned up and convicted, by overwhelming evidence, some of the leaders of the narcotics traffic which is taking such grievous toll of the health and morals of the people particularly the youth of this land . . ."
C. T. 324; Appx. A, 8: ". . . Under these circumstances, there was no prejudice or error."	249 F. 2d at 565: ". . . Moreover, it is clear that appellants were not prejudiced by the challenged ruling of the trial court."

As seen, this Court reversed *Iudiviglio*. The conflict between the instant case and the cases discussed under this Point III justify the granting of certiorari under this Court's Rule 19(1)(b) (4th phrase).

IV.

The Instant Case Is Essentially Identical With Cases Now Pending Before This Court as to Which Certiorari Has Been Granted and Which Are Awaiting Briefing and Argument.

Demonstrating the importance of the question, this Court has this term granted certiorari in at least eight cases involving various facets of the right of the accused to have access to statements made or adopted by a Government witness.[25]

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[25] *Lev v. United States*, No. 435; *Wool v. United States*, No. 436; *Rubin v. United States*, No. 437; *Rosenberg v. United States*, No. 451; *Palermo v. United States*, No. 471 (cert. in these five gtd. Dec. 8, 1958, 27 L. W. 3175, 3176); *Scales v. United States*, No. 488; *Pittsburgh Plate Glass Co. v. United States*, No. 489; *Galax Mirror Co. Inc. v. United States*, No. 491 (cert. in these last three gtd. Dec. 15, 1958, 27 L. W. 3186).

While not all of these cases involve the precise problem as here,[26] there is an element of sameness in many of them.[27] However, the *Rosenberg* case, No. 451, is substantially the case at bar.[28]

For example, the question (No. 1) as to which this Court granted certiorari (27 L. W. 3176) reads as follows:

> "1. Is the rule of this Court in Jencks v. United States, 1957, 353 U. S. 657, a rule of mere procedure, or does it involve a defendant's constitutional rights? May a clear violation of this rule be harmless error? May the conceded error of a trial court in withholding from defense counsel prior statements of principal Government witnesses be excused because a Circuit Court finds that the defense was not hampered in cross-examination of those witnesses? Is it proper for a Circuit Court to determine what use defense counsel might have made of statements erroneously withheld?"

Thus, every issue that this Court will determine in the *Rosenberg* case is also present here.

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[26] Some are concerned with the application and validity of the post-*Jencks* 18 U. S. C. 3500.

[27] For example, in *Lev* there is a question of "harmless error" (Pet. pp. 11 and 38); in *Wool*, the question as to which this Court granted certiorari (Ques. 2) is framed in terms of whether in the light of *Jencks*, petitioner was "prejudiced" (Pet. p. 2); in *Rubin*, there is a question of "harmless error" (Pet. pp. 15-16). See also the Government's Brief in Opposition, filed as to all three cases, page 23, item "a." In the *Palermo* case, questions of "contemporaneousness" are presented (Pet. pp. 2, 4, questions 3 and 8).

[28] Save that, if anything, the instant case is stronger from petitioners' point of view, as we shall point out. We are discussing here only the *Jencks* rule point. In addition, of course, there is present in the instant case the refreshment of recollection point discussed, *supra*, under Point II.

In discussing whether the trial court had ruled correctly in denying the defense access to the letter of the witness to the effect that she would have to rely upon her previous statement to refresh her memory, the Third Circuit in *Rosenberg* said (Petition, Appx. 5a):

> ". . . In all the circumstances, we are unable to see any way in which the defense may have been *prejudiced* by the withholding of this statement."[29] (Italics added.)

And compare this with the court below here [C. T. 324; Appx. A, 8]:

> ". . . Under these circumstances, there was no *prejudice* or error." (Italics added.)

A comparison of the facts in *Rosenberg* with the instant case shows how much stronger is the case here. In *Rosenberg*, the defense was allowed to see practically everything for which it asked, including even the minutes of the Grand Jury. Only the most nominal document, not purporting to set down any of the events or activities about which the witness testified, but a letter to the effect that she needed the document which did set down the events[30] to refresh her memory, was denied him. And it appears that the fact that she sent such a letter was brought out by other testimony. In the case at bar none of the documents was furnished the accused.

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[29] In its Brief in Opposition to the Petition, the Government framed the proposition in these words (p. 10):

> ". . . Since the statement of Miss Vossler which *did* bear on her testimony was turned over to the defense, and since the only facts which the unproduced letter could have shown were otherwise developed, the finding of harmless error by the Court of Appeals was fully warranted." (Italics in original.)

[30] The document which set forth the events was furnished the defense.

In *Rosenberg*, both the trial court and the Court of Appeals had access to the letter and examined it, so that at least they were in *some* position to make a judgment based on the "circumstances". In the case at bar, however, no one, save the prosecutor, knows what was in the statements so that the court below's statement, "under these circumstances, there was no prejudice" is meaningless. How could the court possibly know that, when it has not seen the statements?

* * * * * * * * *

Accordingly, all the reasons which persuaded this Court to grant certiorari in *Rosenberg* are present here, plus the fact that petitioners' case is stronger.

Conclusion.

The petition for writ of certiorari should be granted and the judgment below reversed.

Counsel for petitioners understand that the eight cases mentioned in footnote 25, *supra*, as to which certiorari was granted, will not be argued before March, 1959 and that in view of the lengthy records in at least some of the cases, argument may be later than that. Should this Court grant certiorari here, counsel for petitioners in this case could arrange for a prompt duplication of the record, and could file their opening brief within two weeks after the grant of certiorari, so that the instant case could be ready for argument in March or April when the similar cases will be argued.

In determining the scope of the numerous facets of the *Jencks* rule, this Court should have before it a case in which the former statement of a key witness was used by the witness, just prior to her taking the witness

stand, to refresh her recollection—but the defense was not allowed to see the statement. This is such a case. That question appears in none of the cases to be heard by the Court. It is an issue that calls for determination by this Court in the context of the Court's comprehensive review of the import of the rationale of *Jencks*.

Respectfully submitted,

A. L. WIRIN,

FRED OKRAND,

Attorneys for Petitioners.

DOUGLAS BADT,

Of Counsel.

APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

Arthur L. Harris, Sr., *et al.*, Appellants, vs. United States of America, Appellee. No. 15,222.

June 24, 1958.

Upon Appeal from the United States District Court for the Southern District of California Central Division.

Before: Fee, Chambers and Hamlin, Circuit Judges.

James Alger Fee, Circuit Judge:

Sixty-seven counts, charging defendants therein named of devising a scheme to use the mail to defraud (18 U.S.C.A. §1341), and the sixty-eighth count, charging conspiracy to accomplished the substantive offenses (18 U.S.C.A. §371), were contained in one indictment. Defendants Arthur L. Harris, Sr., Arthur L. Harris, Jr., Charles W. Marshall and Ernest F. Lee have appealed from the judgment of conviction entered on the jury verdict of guilty of conspiracy and of eight substantive counts which had not been abandoned and dismissed.

Defendants were charged with entering into a scheme and artifice to defraud persons who might be induced to purchase lots in a subdivision known as Rocket Town, which was located in the Mojave Desert not far from the Inyokern Naval Ordnance Test Station, and to use the mails in connection therewith. The allegations of false representations were specific and fell generally into seventeen classifications. The briefs in this case are voluminous and reflect the tremendous record.

One of the major specifications of error is that there was not sufficient competent and relevant evidence to

establish the offenses charged in the indictment and to connect the appealing defendants therewith. Without a review of the complicated evidence and facts shown thereby, it may be said at the outset that proof was overwhelming that representations, pretenses and promises were made by means of oral statements, writing, circulars, letters, advertisements, bulletins and papers so constructed, worded and expressed as to deceive, and this was done with the intent to deceive and did deceive and defraud numerous people. From the early part of 1949 to October, 1954, there were contracts of sale entered for 2,769 lots. The representations envisioned an expansive building and development program. Up to date of trial not over seven houses had been built on the entire subdivision. The transcontinental highway, represented as under construction and running through Rocket Town, had not been built there or anywhere else.

But defendants do not mean by the specification that no such false representations were made. It would not be possible to maintain such a position in the face of the record. The lot purchasers in great number testified in minute detail in support of all the counts which were submitted to the jury. There was also sufficient evidence from which the jury could have found and did find a single all-inclusive scheme beginning in 1948 and continuing to 1955. The underlying purpose according to the proof, was the acquisition of raw desert land near the United States Naval Ordnance Test Station and the subdivision thereof and the sales of the lots so produced by false and misleading statements. There was competent evidence that it was intended that the purchasers believe and they did believe that a well organized building campaign and development program was in the process of

consummation. There was evidence that defendants organized this scheme with the intent to sell lots and that their interest went no further and that the design was fraudulent from the inception to the end. There was substantial evidence that the mails were used to carry out the criminal designs.

The objection is here made that the salesmen were not called as witnesses, but only the purchasers, who testified to what the salesmen, not defendants, represented.

The Court recognizes that defendants cannot be held simply because of the pattern or similarity of the representations of individual salesmen. The jury might have found that the government had established no connection with defendants because of such parallelism in the sales talk of various individuals. But the writings, literature, lead cards and lulling letters sent out by or under the direction of some of defendants and the manner of usage thereof were such that the jury had a right to consider these as evidence of bad faith and fraudulent intent upon the part of all defendants. All these were questions of fact. While the testimony of the lot purchasers as to representations made to them by various salesmen not indicted were not conclusive, this evidence could be considered by the jury. Neither the admission of this testimony nor the refusal of the court to strike it was error.

Some of the written representations indicated that a transcontinental highway was "under construction" and that it passed along the edge of "Rocket Town." There was evidence that in 1947 the California State Legislature brought Route 212 into the state road system. This road ran from Freeman Junction to Pahrump Valley. California Streets and Highways Code, §512. But the question raised by the representations is whether defendants

believed it to be under construction and really believed that it would run through or near Rocket Town. A great deal of evidence was introduced by both sides. It will not be reviewed. Suffice it to say, the question of what defendants represented and what they believed was for the jury. It was not, however, error for the court to allow the jury to be driven over the supposed route in the year of the trial. It was not error for the jury to see a photograph of a sign warning travelers of dangers to be encountered along the proposed route or for the jury to hear testimony as to these. The road had not been constructed at time of trial, and the jury had the right to consider these matters in determining the good faith of defendants in any representation the jury found they made. Likewise, there was no error in allowing a view of the area and the Naval Station. The jury had a right to see the situation.

The court refused to permit the introduction in evidence of findings of fact in a civil case between other parties and on other issues where the written representations were held to be true. These findings were not res judicata as to any defendant. The issue in a criminal case is entirely different in any event. The court permitted the complete exploration of this civil case so far as it related to the good faith of Bandurraga, a defendant not before this Court. The exhibit was properly excluded.

Defendants assign as error the fact that the trial court permitted the jury to take notes during the trial and to use such notes during deliberations. Many trial judges strongly disapprove of the practice in question, believing it to be of doubtful, if any, value. Ordinarily it is within the sound discretion of the trial judge and does not con-

stitute error. This Court finds none here. In this case the court carefully instructed the jury in the first instance and in the final charge of the limitations on the use of notes. A similar point is made as to the furnishing to the jury during trial of copies of certain counts of the indictment. The summary count 1 and the conspiracy count 68 were never furnished to that body. The jury were trying these charges. The court had a right to place before them the particular count while the witness was testifying thereto. In this there is no error.

This Court accepts the principle that, in a prosecution for making use of the United States mail in carrying out an alleged scheme to defraud the good faith of a defendant, if established to the satisfaction of the jury, is a complete defense. The matter of the exclusion of findings of fact in a collateral civil case has already been dealt with. Defendants complain that the trial court refused to allow defendants to produce evidence of the instructions given by them to one Roche relative to the preparation and publication of advertising material. The first question, excluded on cross-examination of Roche by defendants, was whether in the preparation of one of these advertising items Roche believed "it truly and accurately stated the facts contained therein." Roche was not on trial, and the question called for a conclusion of his which was irrelevant. The second exclusion related to the question of whether either of the Harrises intimated to or gave directions to Roche to "put any information in any advertising matter which the witness [Roche] knew to be untrue." An offer of proof was made after exclusion. There was testimony that the defendants approved and accepted all the material used in advertising. The question and the offer were entirely immaterial.

The trial judge did not permit Harris, Jr., to state why he placed the following clause in the contract of sale:

"No agreement has been made by seller to rent or resell property herein described, or any portion thereof."

This was not error. The contract was signed by numerous lotholders who testified. Many of them said they had not read the contract. The document spoke for itself. The scheme charged in the indictment was to mislead persons into buying lots. It is obvious that this clause in the contract was to remove positively any obligation to take the property off the hands of the purchasers. Notwithstanding this written provision, one of the representations concerning which many witnesses testified was that the company was about to establish a resale department, which was never done. It was not error to refuse to permit the explanation of the undisclosed design to which defendants would have testified. There was no offer of proof on this.

Harris, Sr., testified as to a development with which he was connected in Palm Springs in 1947 or 1948, which was adjacent to the city limits, and that he had developed Arrowhead Manor Country Club. Several exhibits were produced by the defense to show how these areas were enhanced in appearance and value by the developments. There was cross-examination which brought out testimony indicating that, in these ventures likewise, alluring prospects had been held out to purchasers. Harris, Sr., admitted certain literature was sent out, which was introduced in evidence. Harris, Jr., was cross-examined also as to his connection with the sale of lots, and made admissions which might indicate the plan at Palm Springs and Arrowhead Manor was similar to that used at Rocket Town. The objection that these admissions established

that defendants were guilty of other crimes is not available. This case does not fall within the rule recently followed by this Court in the case of Abdul vs. United States, 9 Cir., No. 15,523, March 31, 1958. In that case, the prosecution injected into the case an independent fraudulent transaction. Here the defense took credit for development at Palm Springs and Arrowhead Manor as proof of good faith and lack of fraudulent intent. The cross-examination was germane and was within the sound discretion of the trial court. This matter was injected into the trial by defendants, not by the prosecution.

After the announcement of the decision in Jencks vs. United States, 353 U.S. 657, appellants filed supplemental briefs, contending that the trial court erred in refusing to require the government to produce for the inspection of defense counsel questionnaires prepared by the government and filled in by lot purchasers. Unlike the situation in the Jencks case, these questionnaires were signed by the purchasers in most cases many years after the happening of the occurrences in question and were sent out by the government as a part of the investigation and prosecution of the present case. Out of the more than twenty-five purchasers of lots who testified, appellants during the trial requested the questionnaires filled out by two of them. The first request was made on the grounds that the questionnaire had been used by the witness to refresh her recollection before testifying and that access to the particular questionnaire would "mak 'er testimony more definite." Objections to the production of these two questionnaires were sustained on the grounds that they were work papers of the United States Attorney not subject to production by the adverse party. The issue was not raised before trial by a request for the questionnaires,

nor was it developed further during trial before the court. Under these circumstances, there was no prejudice or error.

Defendants Marshall and Lea, in a separate appeal brief, contend that the fact that various devices were charged as adjuncts to the main plan breaks the single conspiracy up into innumerable small conspiracies. But the fact that various corporations were used to accomplish this plan, the adoption and use of the name "Rocket Town" in connection with the promised developments, the use of false and misleading sales material in the campaign and the employment of oral misrepresentations by the salesmen engaged in selling lots, does not militate against the charge of the indictment or the finding of the jury that there was a single unified fraudulent scheme in which all defendants joined and which the mails were used to accomplish. There was sufficient competent evidence to prove each charge of which each defendant was found guilty beyond a reasonable doubt.

Appellant Charles W. Marshall joins in the matters above disposed of and adds others. The evidence also established the connection between this defendant and the conspiracy which the jury found to exist and certain substantive crimes set up in the indictment.

The testimony of the witness Doig and maps introduced during his testimony were competent and proper. This all related to the unfeasibility of the supposed transcontinental highway and its supposed construction and proximity to Rocket Town.

Objection has been made that the trial judge held court at various places during the view trip conducted through the area. There is no requirement that court be conducted only in a courthouse. No prejudice has been shown. There was no error.

Defendant Lea raises these questions and some others. There was evidence which connected him personally with certain misrepresentations made to prosecution witnesses. His appeal is without merit.

The whole charge given to the jury by the court fully and fairly covered the case and gave proper place to the contentions of defendants. Defendants contend certain specific charges should have been given. These have been examined and compared with the charge as a whole. There was no error.

Affirmed.

(Endorsed:) Opinion. Filed June 24, 1958.
PAUL P. O'BRIEN, Clerk.

APPENDIX "B."

Opinion Denying Rehearing.

United States Court of Appeal for the Ninth Circuit.

Arthur L. Harris, Sr., *et al.*, Appellants, vs. United States of America, Appellee. No. 15,222.

Nov. 6, 1958.

Upon Petition for Rehearing.

Before: Fee, Chambers and Hamlin, Circuit Judges

Per Curiam:

An able petition for rehearing has been filed which insists that our opinion too narrowly applies the rule of the Jencks case (353 U.S. 657). Any such intention is disavowed. However, at the trial defendants made no great point of the request for these statements in the only two instances where it was denied. There had been fourteen investor witnesses upon the stand before any such attempt was made to see answers to the questionnaire. The point may well have been that defendants were claiming the government influenced the investor witnesses by the form of letter and the questionnaire. One of these transmittal letters and the blank form of the questionnaire were read to the jury by the defense.

Defendants did not specify these rulings as error on this appeal, and only raised the point by a supplemental brief after the announcement of Jencks.

This last circumstance is no reason for denying relief if the rights of a defendant have been violated. But this Court should not frustrate justice to satisfy a formalistic pattern. All these matters are relative. Denial of the right of cross-examination is error. Yet limitation of cross-examination is within the sound discretion of the

trial court. These principles shade into one another. If the trial court had ruled in the face of Jencks, a different situation might be presented.

It is not believed that Jencks requires conformity to a ritualistic taboo. The mere fact that a statement concerning an immaterial matter is not furnished to permit cross-examination of a minor witness is not ground for reversal in any and all events, as defendants seem to believe. Not that it is exactly the situation in the case at bar. It is probable, if the trial court were faced with the same question now, production would be required even if the rule of Jencks did not so require.

If we were to go to the full extent of the position of defendants and hold the ruling was plain error, still a reversal would not be justified in our opinion. If all the investor witnesses had been excluded, there was overwhelming evidence not only to justify conviction, but almost to compel a finding of guilt.

The petition for rehearing is denied.

(Endorsed:) *Per Curiam* Opinion on Petition for Rehearing. Filed Nov. 6, 1958.

PAUL P. O'BRIEN, Clerk.

APPENDIX "C."

United States Court of Appeals for the Ninth Circuit

Arthur L. Harris, Sr., *et al.*, Appellants, vs. United States of America, Appellee. No. 15,222.

JUDGMENT.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgments of the said District Court, be, and each of them, hereby is affirmed.

(Endorsed) Judgment.

Filed and entered: June 24, 1958.

PAUL P. O'BRIEN, Clerk.

APPENDIX "D."

18 U. S. C., 1341:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

* * * * * * * * * * *

18 U. S. C. 371:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

APPENDIX "E."

Exhibit ZZ-115 [R. T. 4946-4951].

"UNITED STATES DEPARTMENT OF JUSTICE
"UNITED STATES ATTORNEY
"Southern District of California
"600 Federal Building
"Los Angeles 12, California

"Emilio & Amada Bejarano
"431—86th St.
"Los Angeles 3, Calif.

"Re: Continental Subdivisions, Inc.
"Transcontinental Land and Water Co.

"Dear Sir & Madam:

"This office is investigating certain transactions involving sale of lots by the above-named companies in the tract commonly known as 'Rocket Town.' I would appreciate your answering the attached questions so we may determine what action, if any, should be taken by this office.

"Please send me all the papers you received through the mails, together with the envelopes in which you received them, as well as all other papers relating to the transactions, such as telegrams, memoranda of telephone calls, receipts, cancelled checks, and copies of your letters and messages. Kindly write your name on each paper you send me so it may be easily identified later.

"You may send the papers to me in the enclosed self-addressed envelope without placing postage on it. If the papers are too bulky to be enclosed in the envelope, you may wrap them in a bundle and securely attach the envelope to it. All papers will be returned to you after the investigation is completed.

"This letter should not be regarded as reflecting upon the character or reliability of the persons operating this concern, and should be treated as confidential. Your co-operation is appreciated.

"Very truly yours,
"LAUGHLIN E. WATERS
"United States Attorney"

And below that a facsimile signature of "Ray H. Kinnison," and below that is the typewritten name of "Ray H. Kinnison, Assistant United States Attorney."

The questionnaire is attached to that and is labeled

"QUESTIONNAIRE IN RE ROCKET TOWN

"(If no mention was made with respect to the particular matter covered by any of the following questions, do not answer that question.)

"Your name:

"Your address:

"Your business or occupation:

"Your phone number:

"How did you first come to deal with these concerns:

"Did you purchase a lot or lots?

"If purchase made, give lot and tract number:

"When did you purchase?

"What was selling price of lot?

"What amount have you paid?

"Who was the salesman?

"What representations were made to you, and by whom, with respect to the availability of the following utilities on your lot?

"Water:

"Electricity:

"Gas:

"Sewers:

"Street lights:

"Paved streets:

"Telephone:

"What was said as to the location of Rocket Town with respect to the main gate of the Naval Ordnance Test Station?

"What was said with respect to FHA financing?

"What was said with respect to financing other than through FHA?

"What was said with respect to Continental Subdivisions, Inc., financing your building?

"What was said with respect to a refund of your money if you were not satisfied with your lot?

"Did you attempt to obtain a refund of your money?

"What happened?

"Did you have any conversations with Arthur L. Harris, Sr., Arthur L. Harris, Jr., Lee R. Wilson, Ben Klien or Lou C. Bandurraga? If so, please give details.

"What was said with respect to Continental Subdivisions, Inc., maintaining a resale department?

"What was said with respect to being able to sell your lot at a profit?

"What was said with respect to Continental Subdivisions, Inc., maintaining a rental department?

"What was said with respect to Continental Subdivisions, Inc., having building plans available for your use?

"What was said with respect to the cost of construction of Rocket Town?

"What was said with respect to a transcontinental highway?

"Was anything said to the effect that Continental Subdivisions, Inc., has itself paved a portion of the Transcontinental highway?

"What was said with respect to the Bank of America (or any other bank), putting a branch in Rocket Town?

"What was said with respect to a big hotel being built in Rocket Town?

"What was said with respect to a Safeway Store or other food super market being built in Rocket Town?

"What was said with respect to other big business concerns putting branches in Rocket Town?

"What was said with respect to stores, shops, theatres and churches being built in Rocket Town?

"Was anything said with respect to the State of California erecting a modern school in Rocket Town? What was said?

"What was said with respect to insurance companies buying lots in Rocket Town?

"Did the salesman say that he owned lots in Rocket Town? What was said?

"Was anything said to the effect that no property near the Naval Ordnance Test Station, other than Rocket Town, was available? What was said?

"Was anything said to the effect that the cost of the lots would increase the next day?

"What was said with respect to Continental Subdivisions, Inc., or Transcontinental Land and Water Co., starting a building program at Rocket Town?

"What was said with respect to income from your property paying off the balance due on your lot?

"Did the salesman show you any magazine articles about Rocket Town?

"What was said?

"Was anything said to the effect that the U.S. Government was 100 per cent behind Rocket Town?

"Were you shown a new price list on the lots which price was to be effective on the following day?

"What was said with respect to home or other buildings which had been completed at the date of your purchase?

"Was anything said with respect to 500 homes then being under construction? What was said?

"Please add any other facts or representations made."

[R. T. p. 4946—R. T. 4951] Exhibit ZZ-115.

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No. 619

In the Supreme Court of the United States

OCTOBER TERM, 1958

ARTHUR L. HARRIS, SR., ARTHUR L. HARRIS, JR., ERNEST F. LEA AND CHARLES W. MARSHALL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinions of the Court of Appeals (Pet. App. A; Pet. App. B) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 24, 1958 (Pet. App. C). A petition for rehearing was denied on November 6, 1958 (Pet. App. B). On November 21, 1958, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including January 5, 1959. The petition was filed on January 2, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in view of all the circumstances presented by this record, the court below erred in finding nonprejudicial the failure to permit the defense to examine replies, requested by the defense as to 2 of 29 investor witnesses, to a questionnaire sent by the office of the United States Attorney as part of an investigation of possible fraud in a scheme to sell real-estate lots.

STATEMENT

On January 26, 1955, an indictment was filed in the United States District Court for the Southern District of California, charged petitioners in numerous counts with mail fraud in violation of 18 U.S.C. 1341 and conspiracy to commit that offense (C.T. 2–70).[1] Trial before a jury was commenced on November 2, 1955. On April 6, 1956, the petitioners were found guilty on the conspiracy count; petitioners Harris, Jr. and Lea were found guilty on twenty-two substantive counts, Harris, Sr. on twenty-one, and Marshall on twenty substantive counts[2] (C.T. 249, 251, 253, 255). Harris, Sr. and Harris, Jr. were each sentenced to three years' imprisonment and a fine of $10,000 on the conspiracy count, and three years' imprisonment on each of the substantive counts, to run concurrently with each other and with the imprisonment imposed on the conspiracy count (C.T. 278–279, 284, 287).

[1] We have adopted petitioners' abbreviations, designating the Clerk's Transcript as "C.T." and the Reporter's Transcript as "R.T.".

[2] During the course of the trial, many of the counts of the indictment were abandoned by the government in the interest of brevity.

Lea and Marshall were each sentenced to eighteen months' imprisonment on the conspiracy count and eighteen months on each of the substantive counts, to run concurrently with each other and the sentence imposed on the conspiracy count (C.T. 279–280, 281, 296). The Court of Appeals affirmed.

I

The scheme to defraud charged in the indictment was to induce investors, through false representations, to purchase lots in an area in Kern County, California, known as "Rocket Town" (C.T. 2–8). The property was owned by Trans-Continental Land and Water Company, *Inc.*, a corporation owned by Arthur Harris, Sr. His son, Arthur Harris, Jr., was sole owner of Continental Subdivisions, Inc., a company designated as exclusive sales agent for the sale of lots in the area. Marshall and Lea were sales agents for Continental.

The "Rocket Town" subdivision was approximately 4½ miles from the main gate of the Naval Ordnance Test Station, built in a remote and uninhabited location because of the Navy's need to use the area as a testing station for rockets and other implements of war. Housing accommodations were provided within the Test Station, but by 1948 some additional housing was needed. The commanding officer of the Test Station during the years 1949–1952 testified that there were in the neighborhood of 600 families on the base actually in need of housing (R.T. 1925). This fact was known to the Harrises (Ex. 1 BB).

"Lead on" representations.

Sales of Rocket Town lots were initiated early in 1949 by sending through the mail what is known as

"lead cards", an advertisement attached to a business reply card, which an interested recipient may return to the sender. Over 4½ million of these cards were mailed by Continental from 1950 through 1954 to various persons whose names and addresses were selected from telephone books (R.T. 4435). A typical lead card, some 1,250,000 of which were mailed by Continental in 1951 and 1952, bears on the outside cover the legend "RED HOT NEWS"; inside appears a drawn illustration captioned "ROCKET TOWN" which pictures a road running into the immediate vicinity of the Naval Ordnance Test Station with a notation thereunder "NEW TRANSCONTINENTAL HIGHWAY (UNDER CONSTRUCTION)." The card reads in part: "Rocket Town. Only 2 miles from the fabulous $200,000,000 Naval Ordnance Test Station * * * ." "Thousands of workers are here NOW. They need homes desperately," and again, "The expansion possibilities are unlimited for home, shops, markets and business firms of all kinds * * * " (Ex. 2). Another one of these many lead cards mailed subsequently bears on the outside cover in large type "F.B.I. about NOTS."[3] In small type underneath, F.B.I. is identified as "Free Bonafide Information." Inside the card reads "ROCKET TOWN HAS PASSED 'THE TEST!' There's no doubt about it! This new frontier of opportunity built close to the amazing NOTS has proved successful!" It continues, in part, "Rocket Town is a part of an established community with . . . * Homes * Stores * Markets * Schools * An Airport * Busi.. s

[3] Naval Ordnance Test Station.

Centers * A Community Hospital * Recreational and Entertainment Facilities * Professional Services, all Kinds . . . and more are urgently needed!"; "Here is an assured Money-Making opportunity for Buyers, Sellers and Rentals"; "This is the opportunity of your lifetime! *Newspapers, Life* and *Saturday Evening Post* have told the story to the nation. Results of visionary investors have already necessitated further expansion!"; "THERE'S STILL TIME! Recent expansion of Rocket Town permits our offering you a limited extension of this wise investment opportunity * * * "; "Convinced by the results, interest in Rocket Town increases at a phenomenal pace * * *"; "FIND OUT WHAT $100 WILL DO FOR YOU IN ROCKET TOWN" (Ex. 235–E). Another lead card reads: "A SENSATIONAL, new Southern California subdivision is making *investment-opportunity* history! It's the Transcontinental Land & Water Company's *miracle* development. Here's the rapidly building community nearest to the very gates of the Navy's highly publicized and permanent $200,000,000.00 Naval Ordnance Test Station! Think of the tremendous, ever increasing needs * * *—homes, entertainment, services of all kinds!" (Ex. 235–G).

All of this printed literature had received the approval of either Harris, Sr., or his son (R.T. 4436–4437).

When a recipient of a lead card responded, a company salesman, equipped with a kit, would call upon him. These kits contained price lists, letters, pictures, cartographs, and other printed literature including articles from *Life Magazine* and the *Saturday*

Evening Post which featured the Navy's Test Station and other communities such as Albuquerque and Inyokern.

The investors who purchased lots, after having been visited by salesmen, including petitioners Lea and Marshall (R.T. 540, 2046, 2419, 4089, 4174, 4631, 4743, 5024, 5143), testified to representations made to them. Some testified as to representations made in conversations with the Harrises (R.T. 155, 3008, 4778). At least two salesmen, not indicted, testified in substance that they had made these same representations to the investors upon the instructions of the Harrises and company managers (R.T. 1317–1370, 177–287). One salesman testified that he resigned upon discovering that misrepresentations were continually made after he reported his knowledge of the same to his superiors (R.T. 2338–2366).

Investment opportunities, profits, progress.

The investors testified they were told that the main gate of the Test Station, in reality 4½ miles from the tract office of the subdivision, was or would be moved to within walking distance of Rocket Town (see *e.g.* R.T. 540, 1173). They were told they could double or triple their investment within a year (*e.g.* R.T. 548, 1553, 4093). They were given the opportunity of buying at some $300 less than the price lists they were shown, and were told that the price would go up the following day or week (*e.g.* R.T. 1174, 1798, 3736). They were advised that the opportunity was so good that the salesman himself, who could not own property there, had purchased lots in the name of some member of his family (*e.g.*, R.T. 5026, 5157).

The investors were also told that the Bank of America, J. C. Penney Co., Metropolitan Life Insurance Company, Safeway Stores, Standard Oil Company, and many other concerns had bought lots in the subdivision (*e.g.* R.T. 1616, 1627, 2054). Some were left with the impression that some concerns were ready to begin immediate construction (R.T. 1163). It was stipulated at the trial that none of these concerns had bought lots in Rocket Town (C.T. 195).

Those purchasers who were interested in the property for commercial purposes were given a "protection letter"—a document stating that it was not the intention of the Continental Company to make a further sale in that particular tract for a like business as that contemplated by the purchaser, provided such business was started within one year from the date of the letter (Ex. 341; R.T. 7073–7083). It was conceded at the trial that the letter had no legal effect since nothing would preclude any other purchaser from carrying on any legal business he desired (R.T. 8336).

The investors testified that they were shown the *Life* and other national magazine articles carried by the salesman. Some said they were either told or led to believe that the articles featured Rocket Town when in reality, as noted above (pp. 5–6, *supra*), they dealt with the Test Station and other communities (R.T. 2536–2537, 3741). Some said they were told that buildings were at that time erected in Rocket Town (R.T. 1614, 1806–1809), that there were stores and supermarkets and a school (R.T. 3616–3617).

The only construction on the subdivision at the time of the trial comprised seven houses (R.T. 5662).

In 1954, the Company sent out "Progress Bulletins." These bulletins dealt sparingly with Rocket Town and consisted primarily of news about the Test Station, and the area in general (Exs. 22–199).

Utilities.

The investors testified initially they were given unqualified assurances that all utilities would be available. A public subdivision report of the Division of Real Estate of California, required by law to be furnished to all investors, confirmed that electric power lines were not installed generally throughout the tracts at Rocket Town, but that electricity would be available to some lot owners only upon payment of a deposit as high as $1,400. At least eight of the investors testified that they had not seen the report prior to purchase, but saw it at some time thereafter or at the time of trial (R.T. 4638, 1799–1800, 1034, 4259–4260, 5149–5150, 2530, 2439, 1260).

FHA financing.

Regardless of the year in which these investors had purchased, or the purpose for which they had purchased, their testimony was that they had been assured that financing by the Federal Housing Administration was then, or would be in the near future, available in amounts of from 80% to 100% of the building value. The Government showed by documentary evidence that it was not until September 26, 1950, that the Continental Company made formal application for FHA

approval, at a time when, according to information supplied in the application, a total of 1,500 lots in four tracts had been sold (including those deeded and on contract) (Ex. 80–A). FHA, in a partial commitment asking for additional documentation and pertaining solely to the first four tracts, consented to consider applications for mortgage insurance only on individual properties from bona fide owner-occupants, the amount for each home not to exceed $4,750.00 (Ex. 80–E). It was not until May 13, 1954, that the company furnished the additional exhibits on the first four tracts requested by FHA (Ex. 80–L; R.T. 2237). A few days later the company sought approval on the last three tracts (Ex. 80–I). FHA had written shortly before this time (Ex. 80–J):

> In view of the fact that we issued the original letter of approval more than three years ago and no evidence of activity is manifest, we see no reason for including Tracts 1578, 1593 and 1600 at this time.

A company letter, dated January 16, 1953, and bearing Lea's signature, informed an investor inquiring about FHA building:

> We are in the *throws* [*sic*] of processing same. We should have something definite within a matter of a few days and will let you know the progress.

Company services: financing, building, rental and resale: refunds.

Some of the investors testified that they were told by Lea and others that Continental would also help in financing (R.T. 1618–1619, 4165, 4182, 4374, 4874).

They testified almost without exception to the company's alleged building program supposedly contemplating the immediate construction of 500 homes (see *e.g.*, R.T. 728–729, 1170, 2691, 4097, 4875). Lea told one investor in April, 1954 that 150 homes would be completed within the next two or three days—that the structures had been already leased (R.T. 4195). Marshall told another that a contractor was to build houses to be completed by Christmas, 1952 (R.T. 5149). Harris, Sr. told another, who in November, 1950, asked why there were no improvements or buildings on the subdivision, that the company was getting a loan of eleven million dollars from a New York insurance company within a few days, and that building would start right away (R.T. 4778–4781).

Documentary evidence as to this representation included a company printed form-letter, dated February 18, 1950, reading in part (R.T. 4787; Ex. 285):

> Our building and financing department is ready to proceed now with its improvement program. We have a tremendous amount of inquiries regarding building at Rocket Town.

A company letter dated October 17, 1951, informed an inquiring investor (R.T. 557; Ex. 10):

> * * * we have referred your request to our Building Department, and as soon as they are ready to accept applications for buildings and to take applications for the process of loans, it will be our pleasure to contact you in re same.

A letter dated August 6, 1951, advised:

> * * * we anticipate starting our building campaign very, very shortly.

The investors testified that they had been assured by Marshall, Lea and the Harrises, among others, that Continental would maintain a rental and resale service (see *e.g.* R.T. 549, 2690, 3011, 4163, 4189, 5026, 5051, 5125). Many of these investors, some of whom had not seen their property prior to purchase and who were concerned at the lack of progress or the desolation noticed upon visits (R.T. 818, 1042, 1814, 2060), contacted the company about resales (R.T. 578, 1814, 2444, 2698–2700, 3460–3461, 3627) or refunds which they had been promised (R.T. 821, 1052, 1301, 1632). No refunds were forthcoming. One investor sold his land back to the company at a loss of over $4,000 (R. T. 3471). Other brokers had told him there was no possible chance of selling (R.T. 3510). Another, who attempted to sell her lot back to the company for half of what she paid for it, was dissuaded by a manager who, knowing that she had not seen the property, said he would not want to rob her because the property would be worth three or four times more if she would keep it—that "homes were going up like hot cakes" (R.T. 3624–3626).

Documentary evidence showed that during the years in question the company sent out many letters to its investors saying in substance that it had no resale department at the date of writing but anticipated establishing one at a later date (R.T. 557, 574, 2700, 3768, 7205–7208; *e.g.* Exs. 6, 12, 104, 108, 351, 353). In 1954, one of the letters pointed out that a clause of the contract specified that the seller made no agreement to rent or resell property (Ex. 17). The investors testified that they had not read this clause

which appeared on the back of the contract (*e.g.* R.T. 1052).

The transcontinental highway.

As to a highway, the investors testified that they had been told that a transcontinental highway would definitely run into Rocket Town on Bowman Road. Some said they were told by Lea, Marshall, and others that the highway was already under construction (R.T. 5147, 5142–5143). Documentary evidence furnished the investors, and produced at the trial, showed maps representing the route of the highway. In addition to the illustration on the lead cards mentioned above (pp. 3–5, *supra*), picturing the highways as "Under Construction," many maps and cartographs pictured the highway coming straight through Rocket Town as a "Possible" or "Proposed" "New Transcontinental Highway" (see *e.g.* Exs. 153, 190, R.T. 218-220).

The government showed through documentary evidence that in August, 1948 the State Highway Commission wrote petitioners' promotional agency that "the ultimate location of the road through this desert area has not yet been determined" (Ex. 22–51). (The California legislature had in 1947 enacted a measure bringing Route 212 into the state.)

In December, 1951, the Division of Highways wrote Continental (Ex. 163):

> * * * nothing definite can be stated. It appears very likely that a survey will be started this winter and it likewise appears very likely that the proposed route will be in close proximity of the Bowman Road.

In January, 1952, the Division wrote Harris, Sr. of a proposal to develop Bowman Road, in time, into a freeway; if it materialized it would appreciably diminish the depth of lots north and south of the road (Exs. L–1, 164). The subdivision had not made allowance for any freeway (Ex. 23).

In March, 1952, the Highway Commission wrote Transcontinental (Exs. 166, 22–58) that it could not assure that the highway would follow Bowman Road, "Consequently nothing should be done toward securing this right of way until you are advised further." Two months later, Transcontinental was advised of a pessimistic outlook concerning funds to finance any project; no assurance was given that the highway would be built then or at any definite time in the future (Ex. 167).

Hundreds of thousands of lead cards were sent out after this time, including those, as noted above, p. 4, *supra*, picturing a transcontinental highway "Under Construction."

Other letters of the Commission in 1953 and 1954 made it clear that the problem of finances made the construction of any highway speculative. At the time of trial, the highway had not been constructed.

II

The seventeenth investor witness was a Mrs. Craggs, who had purchased one lot from a salesman named Hamilton and two other lots after talking with Lea (R.T. 2156 ff.). During her testimony, the government introduced a memorandum from Continental's files which was a report of a call upon the

witness and her husband in April, 1954. It read in part (R.T. 4212):

> Mr. Craggs was somewhat upset because of a letter from a Mr. blank of postal department.

At the outset of his cross-examination, counsel for the Harrises asked for "all communications sent by this witness" to government counsel, "including the response to the questionnaire that you sent to her, which she testified to" (R.T. 4219). Government counsel said the witness had furnished nothing but material in the confidential files, which were the government's work papers, and defense counsel said he would develop that on cross-examination (R.T. 4219).

On cross-examination, the witness was then asked what conversation she had had with the salesmen (Hamilton and petitioner Lea) before certain clippings concerning a cross-country highway were left with her. When she said she could not remember the details, the defense counsel said (R.T. 4299):

> Well, now, isn't it a fact that this is what happened: That you told these gentlemen that you had been informed by the Post Office Department that there was no such thing as a cross-country highway, and they then said "Why, that isn't true."

When the witness denied this, counsel asked whether the salesman had left the clippings, "without regard to any conversation with reference to the Post Office Inspector or Mr. Kinnison or the Department or the U.S. Attorney having written you some letters." The witness said she told the salesman she had received a questionnaire from the United States

Attorney's office (R.T. 4300). She subsequently said she told the agents she had filled in the questionnaire (R.T. 4305, 4319). Later, on cross-examination by counsel for Lea and Marshall, she testified that she had read over her answers to the questionnaire, before testifying (R.T. 4459). Counsel asked for production of the questionnaire which was refused (R.T. 4461–4462).

Thereafter, another investor witness testified, and was not examined concerning the questionnaire (R.T. 4500–4545). As to the next such witness, it was brought out on cross-examination that she had filled in the questionnaire in 1954, and had read it about a week before she testified (R.T. 4613–4614). No request for production was made. The next witness could not remember receiving a letter from the United States Attorney but stated that he and his wife had filled in the questionnaire (R.T. 4698–4699). When a request for production was made, the United States Attorney stated that the document was a work paper and the court agreed that this legal objection was valid (R.T. 4698–4701). The witness testified that he had not seen the questionnaire since he completed it in February, 1954 (R.T. 4701). Three other investor witnesses testified without examination as to the questionnaire (R.T. 4732–4772, 4772–4829, 4830–4869). Then the witness Bejarno testified on cross-examination that he tried to resell his lots to the company because, after inspection, he did not like them, but that he was told to wait six months (R.T. 4925–4928). Subsequently he made a deal with Harris by which he obtained a deed to one lot and cancelled the contract

on another (R.T. 4933–4935). He said he told Mr. Harris that he heard the government was investigating and he wanted to get his money (R.T. 4935, 4942). Counsel for Harris then offered in evidence the blank form-letter and questionnaire sent out by the United States Attorney's office in February, 1954 (R.T. 4943-4951).[4] The witness said that after he received the questionnaire he talked with Mr. Kinnison and then went to Mr. Harris (R.T. 4952). No questions were asked as to whether the witness had signed the questionnaire, and no demand for production was made. After another group of investors had testified, one was asked on cross-examination whether she had filled in the questionnaire and she said she had (R.T. 5219). No further questions were asked and no request for production was made.

ARGUMENT

This case was tried before the decision of this Court in *Jencks* v. *United States*, 353 U.S. 657, and of course before the enactment of 18 U.S.C. 3500. Under both the decision and the statute, we think that production of the replies to the questionnaire, when requested, would be required. While the two replies to the questionnaire requested by the defense were not contemporaneous with the events to which they referred, they were made by the witnesses about two years before the trial, related to the testimony of the witnesses at the trial, and in one instance had been used by the witness before trial to refresh her recollection. For

[4] This is set forth in Appendix E to the petition for a writ of certiorari.

these reasons, we feel that the replies to the questionnaire were statements within the purview of 18 U.S.C. 3500.

The sole question which this case presents, therefore, is whether, under the particular circumstances of this particular trial, the error in failing to accede to the request for the production of the replies, with respect to the 2 out of 29 investor witnesses as to whom such a request was made, was so prejudicial as to warrant reversal of a clearly merited conviction resulting from a trial of over five months. It is the government's position that—in the light of the whole record, and of the gross fraud amply proved by documentary evidence of the company's literature and public records, as well as by the testimony of former salesmen for the company, and of all the other investor witnesses whose replies to the questionnaire were not sought—the court below properly held that the error was harmless and did not justify reversal of the conviction.

This case is not, as petitioner argues, like those in which this Court has already granted certiorari. Each of those cases, in some form or other, presents a question as to what constitutes a statement within the purview of 18 U.S.C. 3500, and attacks the validity of the statute in limiting production to statements signed or adopted by the witness.[5] It is true that in some of

[5] Nos. 489 (*Pittsburgh Plate Glass Co* v. *United States*, 358 U.S. 917) and 491 (*Galax Mirror Co., Inc.* v. *United States*, 358 U.S. 918) involve grand jury minutes; Nos. 435–437 (*Lev* v. *United States*, *Wool* v. *United States*, and *Rubin* v. *United States*, 358 U.S. 903) and No. 471 (*P[illegible]* v. *United States*, 358 U.S.

those cases the government has argued and will argue that non-production, even if erroneous, was not prejudicial, but the initial question in those cases is whether production was required at all. Here, the government, as already noted, admits that both the decision in *Jencks* and the statute cover the replies which were not produced. The sole issue is the significance of the conceded error to this case as a whole.

By its very nature, harmless error is a problem which must be resolved on the particular facts of each particular case and cannot be said to be contrary to or in conflict with a decision on other facts in other cases. As this Court said in *Kotteakos* v. *United States*, 328 U.S. 750, 761, the discrimination required in deciding whether an error is technical or substantial "is one of judgment transcending confinement by formula or precise rule." And further, at p. 762, "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations. * * * Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment."

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905) involve an investigator's report of a conversation with the witness; No. 451 (*Rosenberg* v. *United States*, 358 U.S. 904) involves a letter written by the witness which did not relate to the facts to which the witness testified. In No. 488 (*Scales* v. *United States*, 358 U.S. 917), the challenge is to the fact that irrelevant material was excised before the statement was turned over.

We attempt no "color matching" with other cases. We think that—unless it can be said that never, under any circumstances, may the failure to produce as to any witness, no matter how inconsequential, be deemed non-prejudicial (and the lower courts have held otherwise*)—the court below properly found that there was no prejudicial error in this case. The brief summary of the 9,000-page transcript which we have given in the Statement, *supra,* shows that this case was one of gross fraud, all the more reprehensible because it was cleverly disguised with evasions and half-truths. The trial court, in sentencing the defendants, said that he found that the "utmost of bad faith" had been proved, but that he was taking into consideration the fact that none of the defendants was young (R.T. 9191–9192). This fraud was proved, not only by the testimony of the investor witnesses, but by literature emanating from the petitioners' companies, by documentary evidence, and by the testimony of some former salesmen.

Moreover, we think that the record makes it abundantly clear that the defense was not much interested

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United States v. *Sheba Bracelets*, 248 F. 2d 134 (C.A. 2), certiorari denied, 355 U.S. 904; *Simms* v. *United States*, 248 F. 2d 626, 629–630 (C.A. D.C.), certiorari denied *sub nom. Duncan* v. *United States*, 355 U.S. 875; *Padron* v. *United States*, 254 F. 2d 574, 576 (C.A. 5), certiorari denied, 358 U.S. 815.

The *per curiam* opinion in *Indiviglio* v. *United States*, 357 U.S. 574, does not represent a holding that an error of this kind can never be harmless. The conviction there concededly had to be reversed on grounds unrelated to production of documents. The citation of *Jencks* in the *per curiam* reversal represents, we believe, the Court's disapproval of the opinion below.

in the replies to the questionnaire. Sixteen investor witnesses testified for the government before the questionnaire was mentioned by defense counsel. This cannot be attributed to lack of knowledge on the part of the defense. As appears from the Statement, *supra*, Mrs. Craggs testified that she told salesmen Lea and Hamilton about the questionnaire shortly after filling it in; another testified that, after receiving it, he went down and told Harris that he wanted his money back because the government was investigating the sales. Indeed, defense counsel asked for a reply to the questionnaire before there had been any direct testimony as to the questionnaire (see the Statement, *supra*, p. 14), and defense counsel had a blank form of the questionnaire which he read into evidence (*supra*, p. 16). Even after the issue of the questionnaire had been opened up, defense counsel did not pursue the matter. They allowed one witness to testify without asking any questions about the questionnaire, made no request for production as to the next, and then asked for production only as to the one other witness. In answer to the argument made for petitioners in the court below—*i.e.*, that the pattern had been set and that counsel could not pursue the attempt without prejudice to their clients—it should be noted that they showed no such reluctance as to other objections. Although they stated they had a running objection to testimony by salesmen not indicted (see *e.g.* R.T. 2522–2523, 3607–3608) and although they had made abundantly clear their position that company documents were not, as

such, admissible against the defendants, they constantly reiterated such objections during testimony by later investor witnesses (*e.g.* R.T. 4199, 4211–4212, 4215–4216, 4216–4217, 4502, 4582, 4649). And, above all, even if the testimony of all other investor witnesses after Mrs. Craggs be disregarded, the evidence against petitioners remains overwhelming.

The real issue in this case was, not whether the representations were made, but the good faith of petitioners. The Harrises in particular tried to show that the company literature was justified, and also attempted to disclaim responsibility for the acts of the salesmen (R.T. 5535 ff.). Each of the petitioners took the stand and testified at length in support of his position. In the face of this and of the very strong proof that the government adduced, as contrasted with the insignificance of the failure to produce the two replies, we submit that the finding of harmless error by the court below was fully justified. There is no occasion for this Court to undertake another review of this lengthy record.[7]

[7] Petitioners have suggested that this Court grant certiorari and hear the case at the same time it considers the others referred to in fn. 6, *supra*. As discussed, *supra*, p. 17, we do not think this case presents issues in common with those cases. And since it is our position that the only real issue in this case is harmless error which must be determined on the whole record, the government would, if the Court decided to hear the case, be required to undertake a more extensive and detailed review of the 9,200-page transcript than has been possible at this stage. This would, of course, necessarily take substantial time.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1959.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 619

ARTHUR L. HARRIS, SR., ARTHUR L. HARRIS, JR., ERNEST F. LEA, CHARLES W. MARSHALL,

Petitioners,

vs.

UNITED STATES OF AMERICA

APPLICATION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI; AND MEMORANDUM.

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APPLICATION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Counsel for petitioners has been privileged to listen to the oral argument just heard by this Court in the eight cases involving the applicability or non-applicability of the *Jencks* case and/or the Jencks statute.[1] Counsel for petitioners are also familiar with the briefs in those cases.[2]

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[1] *Ley* v. *United States*, No. 435; *Wool* v. *United States*, No. 436; *Rubin* v. *United States*, No. 437; *Rosenberg* v. *United States*, No. 451; *Palermo* v. *United States*, No. 471; *Scales* v. *United States*, No. 488; *Pittsburgh Plate Glass Co.* v. *United States*, No. 489; *Gulax Mirror Co., Inc.* v. *United States*, No. 491.

[2] With the consent of the parties, petitioners filed a brief *amici curiae* in one of them, *Rosenberg*, No. 451.

As a result thereof, we are convinced that irrespective of what the Court does in those eight cases, the instant case is sufficiently different and presents a point of such compelling importance as to warrant the grant of certiorari herein.

Hence application is made for leave to file the attached Memorandum to demonstrate that contention.

Respectfully submitted,

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FRED OKRAND,
Attorneys for Petitioners.

DOUGLAS BADT,
Of Counsel.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

By its—for the first time before this Court—concession (Br. in Oppos. 16) that the trial court committed clear error under both the *Jencks* case (353 U.S. 657) and the Jencks statute (18 USC 3500),[3] the Government has sought to narrow the scope of the questions raised by the petition for writ of certiorari. We acknowledge that the Government can confess error, and is to be commended for so doing. But we do not believe that thereby—by abandoning before this Court the very contention which led the two courts below into error—the Government can improve its position and defeat petitioners' right at least to be heard.[4]

In any event, as we shall show, the Government's elimination from the case of the issue as to whether petitioners were entitled to production of the statements, does not invalidate the other cogent reasons as to why certiorari should be granted. Indeed the narrowing of the issue by the Government, in the circumstances of this case, increases the necessity for the granting of the petition.

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[3] Cf. decision of the Court of Appeals in the *Lee-Wood-Rubin* case, R. 85.

[4] Cf. the Government's argument in its brief in the *Rosenberg* case, pg. 65: "This position, taken at the trial, cannot be abandoned on appeal for supposed advantages to be gained by a contrary contention at the present stage."

I

Even if in All the Other Cases this Court Were to Find Harmless Error and Affirm, the Problem Present in this Case Would Still Be Undecided.[5]

The situation in the instant case is not present in any of the other cases where the Government has raised the harmless error point. Here *neither* the court below nor the trial court ever saw the statements. And, presumably, neither has this Court, nor will it.[6] Indeed, we feel safe in saying that neither have Government counsel before this Court seen the statements.[7] So that they are arguing harmless error in a vacuum and they are asking this Court to deny certiorari based upon the same lack of information. In none of the other cases is this so.

In the *Lev-Wool-Rubin* cases, the Court of Appeals saw the summary (and based its decision on its personal knowledge). In the *Rosenberg* case, *both* the trial court and the Court of Appeals saw the documents. The same is true in *Palermo*. And in all these cases, the "sealed envelopes" are before this Court.[8] Accordingly, it could be said,

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[5] When we speak of the other cases, we are really referring to the *Lev, Wool, Rubin, Rosenberg* and *Palermo* cases, for apparently in the other three—*Scales, Pittsburgh Plate Glass* and *Galax Mirror*—the Government makes no harmless error argument, although at the argument in the *Galax* case, Government counsel did say that they had a case without Jonas. Of course, the text to this footnote presupposes that the Court holds the documents to have been producible and that the "no-prejudice, harmless error" doctrine applies even if there has been a clear violation of the *Jencks* rule or the Jencks statute. Cf. brief of amici curiae in the *Rosenberg* case.

[6] At least to petitioners' knowledge, there is no "sealed envelope" lodged with the Clerk of this Court into which the members of this Court can look.

[7] Cf. the *Lev-Wool-Rubin* cases where in oral argument Government counsel advised the Court that through the "courtesy" of the Clerk of this Court he had seen the "summary."

[8] Though never seen by defense counsel.

arguendo, that there was *some* basis for a "harmless error" ruling. Not so in the case at bar.

Nor can it be said of this case, as the Government says in *Rosenberg* (Br. pp. 17, 25; and at oral argument), that the documents here are "peripheral." As the blank form of the questionnaire shows (Appx. E to petition) the documents denied the petitioners pertained to the very testimony of the witnesses in court, even as to the form of the questions, and as to all the facets thereof (cf. Petition, pg. 6). Similarly, it can not be said in this case, as the Government says in the *Lev-Wool-Rubin* cases (Br. 26 and at oral argument), that the testimony of the witnesses did not involve petitioners or that they related to a time long before petitioners entered the alleged conspiracy and so the witnesses did not implicate them, or that the witnesses' testimony was corroborated by petitioners' or that the witnesses were secondary. And it can likewise not be said in this case, as the Government says in *Palermo* (Br. 23-24), that "defense counsel did receive, and fully use in unrestricted cross-examination of the witness, other lengthy, pre-trial statements covering the same subject matter."[9]

Moreover, the Government's argument to this Court in the other cases demonstrates that even the Government considers this case different from those on the harmless error point and that it really agrees with petitioners. Thus in its brief in *Palermo*, the Government said (pg. 23):

> "In *Jencks*, the unproduced documents had not been exhibited to and examined by the courts below; *accordingly, those courts could not discharge any duty of*

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[9] The same thing was true in *Rosenberg*, where the Court "lean[ed] over backwards" (R. 47-48; Govt. Br. 13) in giving defense counsel access to all sorts of documents, including the grand jury testimony. Cf. also the *Galax* case where defense counsel were given access to the very notes the prosecuting attorney took when he interviewed the witness preparatory to trial.

determining whether denial of production had been harmless." (Second italics added)

Precisely!

And the Government, this time in *Rosenberg* (Br. 49), also explained *Jencks* as meaning that "the Court felt it would be unfair to deny the defense access to statements of the witness, attributable to the witness, which do relate to the testimony of the witness at the trial." Again: precisely!

Furthermore, although the Government argues here, without its present counsel or the courts below having seen the statements, that only harmless error had occurred, in the *Lee-Wool-Rubin* cases it acknowledged (Br. 22) that in a statement of the witness to be used for impeachment purposes "these subtle variations are *significant*" (italics added) and that (Br. 62-63) even in a case "in which the jury found defendants guilty on the basis of overwhelming evidence" [10] a "serious defect in procedure might nonetheless require a new trial." We suggest that both these considerations are present here; that defense counsel were entitled to examine "these subtle variations" and that the refusal of the trial court to permit this was, indeed, a "serious defect in procedure." So that a harmless error argument in this case is inapposite.

Accordingly, whatever the outcome of the cases as to which oral argument has just been heard, the factual situation in the instant case—where neither court below saw the admittedly producible statements—presents, even on the theory of the Government, a case for the granting of certiorari on the very question as to whether the harmless error doctrine can apply.

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[10] A proposition we say does not obtain here.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITIONERS' REPLY MEMORANDUM ON PETITION FOR WRIT OF CERTIORARI.

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PETITIONERS' REPLY MEMORANDUM ON PETITION FOR WRIT OF CERTIORARI.

We take issue with the Government's position (p. 17) that the case is one of gross fraud amply proved. We insist the case on the evidence is a close one; that the—now for the first time—conceded error in keeping relevant evidence from the defendants, could have, in the minds of the jury, tipped the closely balanced scales and led to acquittals.

We do not intend in this, what can only be a short memorandum, to closely or exhaustively analyze the facts. In the briefs in the court below such analyses took up a major portion of the space. We do feel, however, that at least a few errors and misleading statements in the Government's brief should be pointed out.[1]

[1]The briefness of these comments is not to be taken as acquiescence in the Government's view of the facts not mentioned.

Thus, for example, the Government states (p. 11): "No refunds were forthcoming." This is clearly incorrect. No less than 72 pages of the transcript [R. T. 7781-7853] is devoted to the introduction of evidence showing that many, many refunds were made to persons who asked for same and that some 189 exhibits [ZZ204-ZZ393] were introduced showing refunds that were made.

Again, the Government states (p. 5) that the printed literature had received the approval of either Harris, Sr., or his son. It neglects to state that no printed literature was distributed which did not have the prior approval of the California Division of Real Estate and that in every instance where a change was suggested by that agency, the change was made [R. T. 7659-7661].

The Government suggests (p. 21) that the real issue in the case was not whether representations were made, but whether they were justified. Yet in Government counsel's argument to the jury[2] he said, after more than 2½ hours of argument: "at last we have a representation that has not been denied by any of the defendants" [R. T. 8967, lines 4-6].

The Government claims (p. 7) that the so-called "protection letters" were evidence of bad faith, yet it does not suggest, for it cannot, that the defendants ever violated their agreements in those letters and ever sold lots to persons for lil e businesses. Rather than being evidence of bad faith, this fact is evidence of good faith.

The Government says (pp. 11-12) that some investors testified that they had not read the clause "on the back of the contract" which clearly stated that there was no

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[2]Not reproduced in the record.

agreement by seller to rent or resell the property. Yet, aside from a statement that the contract was to be performed in Los Angeles, that clause was the *only* contractual clause on the back of the contract and it was on the back of the contract that the parties signed. Prior to the executory clause of the contract, on the back thereof, there are only two short sentences. In order for a person not to see the clause in question and still sign the contract, he would consciously and literally have to close his eyes. Had defendants been permitted to show discrepancies between what these witnesses had said on the stand and what they had said before, it is abundantly clear that the jury would have looked with a different eye at such testimony.

ARGUMENT.

This is the first time in these entire proceedings that the Government has conceded (p. 16) the trial court erred in not permitting defense counsel to see the statements. Had it done so in the court below, there is no way of telling what view that court might have taken. And clearly, had it done so in the trial court, the case would have taken on an entirely different color. Certainly the trial court would have ruled differently.

The Government's argument in this case is clever, but this cannot obfuscate the issue. In the other Jencks type cases now pending on certiorari before this Court the Government argued that there was no error *and*, in most, that the error was harmless (Briefs in opposition: Nos. 435, 436, 437, p. 2; No. 451, p. 10; Nos. 489, 491, p. 2). Its concession in this case, now for the first time, that error was committed—its abandonment of the first ground of opposition to certiorari in the other cases in this Court as to which certiorari was granted—cannot improve its posi-

tion. In the other cases—*Rosenberg*, No. 451, for example—the doctrine of harmless error did not deter this Court from granting review. No more should it deter the Court in this case. As in *Rosenberg*, the doctrine of harmless error is equally inapplicable here. Moreover, the Government's concession is only as to the *Jencks* rule and 18 U. S. C. 3500. The Government says nothing about petitioners' point that certiorari should be granted to clarify the present status of *Goldman v. United States*, 316 U. S. 129.

This is not a case wherein the Court will be put to the question as to whether "never, under any circumstances, may the failure to produce as to any witness, no matter how inconsequential, be deemed non-prejudicial" (Govt. Br. 19). Not even the court below viewed the case as such (Pet., Appx. B, p. 11). The witnesses in this case as to whom production was not allowed were substantial and the Government relied heavily on their testimony (see Pet., p. 5).

We do not think, in fairness to defendants, that a hearing should be denied them based on the number of times their counsel sought production. The trial court had made its erroneous rulings twice. This was sufficient to protect the record. Just as in the other cases tried before *Jencks* which have been reversed, these defendants too are entitled to the benefit of that rule.

As to petitioners' suggestion that this case be permitted to be argued at the same time as the other *Jencks* type cases now before the Court, we add this:

We are advised that the cases referred to in footnote 25, page 19, of the petition[3] are tentatively set for argument in April, 1959. We are also advised that this Court will return to session on February 24.

Should the Court grant certiorari herein on February 24, petitioners intend to waive the filing of an opening brief and will rely upon the petition. This would permit the Solicitor General to file the Government's Brief on or before March 26, 1959.[4]

With respect to the printing of the record, the major portion thereof consists of 9,200 pages of reporter's transcript. This was prepared by the Ozalide process and the Court reporters advise that additional copies can be prepared within two weeks though they would prefer three. Because the record is so large, the expense of printing so great, and the Ozalide duplication so clear, we would ask leave that printing not be required but that 10 copies of the reporter's transcript be permitted to be filed. As to the clerk's transcript, consisting of 329 pages, we would cause that to be printed, or, in order that the pagination not be changed, could file 10 typewritten copies thereof.

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[3] *Lev v. United States*, No. 435; *Wool v. United States*, No. 436; *Rubin v. United States*, No. 437; *Rosenberg v. United States*, No. 451; *Palermo v. United States*, No. 471; *Scales v. United States*, No. 488; *Pittsburgh Plate Glass Co. v. United States*, No. 489; *Galax Mirror Co., Inc. v. United States*, No. 491.

[4] In the petition for writ of certiorari, we said (p. 22):

> "Should this Court grant certiorari here, counsel for petitioners in this case could arrange for a prompt duplication of the record, and could file their opening brief within two weeks after the grant of certiorari, so that the instant case could be ready for argument in March or April when the similar cases will be argued."

The Solicitor General now has a copy of the record and so there need be no delay on his part to await the filing of the additional copies with the Clerk of this Court.

We repeat the statement made in the petition, pages 22 and 23:

> "In determining the scope of the numerous facets of the *Jencks* rule, this Court should have before it a case in which the former statement of a key witness was used by the witness, just prior to her taking the witness stand, to refresh her recollection—but the defense was not allowed to see the statement. This is such a case. That question appears in none of the cases to be heard by the Court. It is an issue that calls for determination by this Court in the context of the Court's comprehensive review of the import of the rationale of *Jencks*.

Respectfully submitted,

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